

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

JOSE PADILLA

vs.

COMMANDER C.T. HANFT

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:  
:  
: C/A No. 2:04-2221-26AJ

Status Conference in the above matter held  
on Tuesday, September 14, 2004, commencing at  
10:05 a.m., before the Hon. Robert S. Carr, in  
the United States Courthouse, 85 Broad Street,  
Charleston, South Carolina, 29401.

APPEARANCES:

ANDREW G. PATEL, ESQUIRE, 111 Broadway,  
New York, NY, appeared for petitioner.

JONATHAN M. FREIMAN, ESQUIRE, P.O. Box  
1832, New Haven, CT, appeared for  
petitioner.

MICHAEL O'CONNELL, ESQUIRE, appeared  
via telephone for petitioner.

MILLER SHEALY, ESQUIRE, P.O. Box 978,  
Charleston, SC, appeared for the  
Government.

DAVID SALMONS, ESQUIRE, appeared via  
telephone for the Government.

SRI SRINIVASAN, ESQUIRE, appeared via  
telephone for the Government.

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1 THE COURT: All right, good morning.

2 MR. PATEL: Good morning, Your Honor.

3 MR. SHEALY: Good morning.

4 MR. SALMONS: Good morning.

5 THE COURT: Let's see, let me get everybody to  
6 notice their appearance for the record. I'll start  
7 with Mr. Shealy, and then we'll -- I've got the  
8 names, but I want to make sure I hear their voices,  
9 too, and know who's who.

10 MR. SHEALY: May it please the Court, Your  
11 Honor, we're here this morning on Jose Padilla  
12 versus Commander C.T. Hanft, of the United States  
13 Navy Commander. The case number civil number  
14 2:04-2221-26AJ.

15 Your Honor, I'm here appearing as local counsel  
16 and as counsel for the Department of Justice, and my  
17 co-counsel, who are on the telephone, are Mr. David  
18 Salmons of the Solicitor General's office, and also  
19 Mr. Sri Srinivasan, also of the same office. And I  
20 will allow defense counsel to introduce themselves.

21 THE COURT: Okay.

22 MR. PATEL: Your Honor, on the telephone is  
23 Michael O'Connell, who is acting as our local  
24 counsel. My name is Andrew Patel; I have been  
25 admitted pro hac vice to appear for Mr. Padilla in

1 this matter. And standing with me is Mr. Jonathan  
2 Freiman, whose application to be admitted pro hac  
3 vice is pending in the District Court.

4 THE COURT: Okay, good. Thank y'all very much.  
5 Mr. O'Connell, can you hear us?

6 MR. O'CONNELL: Yes, sir.

7 THE COURT: And Mr. Salmons and Mr. --

8 MR. SRINIVASAN: Srinivasan. Hear you fine,  
9 Your Honor, thank you.

10 THE COURT: Okay, good. I want to first of all  
11 thank all of you for taking time to be here and be  
12 on the phone, because we all know this is an  
13 important case for everybody involved. And, you  
14 know, Senator Thurmond used to say -- Senator  
15 Thurmond used to call everybody great Americans, so  
16 I'm glad to have all you great Americans with us  
17 here today.

18 I understand that this is just the beginning of  
19 a long long process with this case, and I think the  
20 best thing I can do here to start with is to make  
21 sure that we manage the case properly, accurately,  
22 that we frame the issues, develop whatever facts  
23 need to be developed and so forth. So I need  
24 y'all's help, and I'd like you to give me your  
25 recommendations with regard to the procedural

1 handling of this case. And I know that, Mr. Patel,  
2 you and your brethren originally asked for an  
3 evidentiary hearing within ten days after the -- not  
4 an evidentiary hearing -- oral arguments within ten  
5 days after the filing of the petitioner's reply.  
6 And I read in your reply that you want to file a  
7 motion for summary judgment. So ten days doesn't  
8 really sound very practical -- didn't sound  
9 practical then, doesn't sound practical now. Tell  
10 me what you envision.

11 MR. PATEL: Your Honor, if I may, we've  
12 actually -- that is, the Government and we have had  
13 a chance to discuss this, and we have a schedule to  
14 propose for Your Honor's consideration, which is  
15 that we would file our motion for summary judgment  
16 which addresses the President's authority to do  
17 this, on October 18th; the Government's response  
18 would be filed on November 22nd; our reply would be  
19 filed on December 13th, and -- which gets us right  
20 before the winter holidays.

21 And at that point, Your Honor, we're not sure  
22 whether you would want us to schedule oral argument,  
23 or whether Your Honor might like to set that down  
24 for another status conference. And I think our  
25 thinking behind that was, as we sit here today, one

1 can never be sure what the future holds. And what  
2 our -- the concern is that there may be some issue  
3 that Your Honor would want us to file additional  
4 briefs on. So we could either have a date, you  
5 know, the week before Christmas or the week -- you  
6 know, sometime after our reply, either for oral  
7 argument, or if there's some other issue that Your  
8 Honor feels that additional briefing would be  
9 helpful to the Court, to schedule that. We leave  
10 that -- that's what we would propose, and the end of  
11 that schedule is somewhat open as Your Honor feels  
12 fit.

13 THE COURT: And you think though that oral  
14 arguments rather than deciding it on the pleadings  
15 would be appropriate?

16 MR. PATEL: Your Honor, we leave that entirely  
17 up to you.

18 THE COURT: Okay. How does the Government feel  
19 about that? Mr. Patel says y'all talked about it,  
20 and I know you have, but I'd just like to hear, Mr.  
21 Shealy, how do you feel about oral arguments and  
22 this schedule?

23 MR. SHEALY: Yes, sir. I think I tend to agree  
24 with Mr. Patel, and I believe Mr. Salmons and Mr.  
25 Srinivasan do as well. I think perhaps the best

1 thing to do is proceed with the schedule, if the  
2 Court accepts it, we have laid out for you this  
3 morning. And maybe consider, after all the  
4 pleadings are in pursuant to that, perhaps have  
5 another one of these hearings or a telephone  
6 conference, or everyone come to Charleston and  
7 decide what we need to do. I think at that point  
8 everything will be much more clear in terms of  
9 whether or not we even need oral argument.

10 MR. SALMONS: Your Honor, this is David Salmons  
11 from the Department of Justice. We agree with that.  
12 And just so that -- just so that everything is  
13 clear, the idea here is that the petitioner's  
14 counsel have an argument that they would like to  
15 present to the Court initially, that would assume  
16 the Government's facts as set forth in our return  
17 and the attached declaration, and that would say  
18 even under those facts, the President lacked the  
19 authority to detain Mr. Padilla as an enemy  
20 combatant.

21 And we have no objection to proceeding with that  
22 legal argument first, and proceeding along the lines  
23 that have been laid out. We just wanted to make  
24 clear that the way that the proceedings would go  
25 forward would be that for purposes of that motion,

1 the Court would assume the accuracy and the  
2 correctness of the facts asserted by the Government  
3 in their return.

4 THE COURT: All right, I understand what you've  
5 said. There are a number of issues, there are three  
6 or four issues raised in the petition, and this only  
7 involves one of the four issues.

8 Two of the issues, one of them has to do with  
9 interrogations, and one has to do with attorney-  
10 client relationships. I gather from the pleadings,  
11 that the interrogation issue is now moot. Is that  
12 agreed or not agreed? The Government represents  
13 that -- in the pleadings and their return that they  
14 are no longer interrogating Mr. Padilla, so is that  
15 issue now moot?

16 MR. FREIMAN: Your Honor --

17 THE COURT: Yes, sir.

18 MR. FREIMAN: -- we have two concerns with the  
19 Government's averments in its response. The first  
20 is that their language is that they have no plans at  
21 present to interrogate Mr. Padilla. Our concern is  
22 that their plans may change. And so we do not  
23 believe that issue is moot. We believe --

24 THE COURT: Well, let me see if we can resolve  
25 that issue though. Mr. Shealy or Mr. Salmons or Mr.

1 Srinivasan, what can you tell us about  
2 interrogations, and is there some way we can resolve  
3 this issue and take it off the table?

4 MR. SALMONS: Your Honor, this is David Salmons.  
5 What I would like and what I think we can say now is  
6 that at the present time there are no ongoing  
7 interrogations or interviews with Mr. Padilla. It's  
8 difficult for us to rule out absolutely any  
9 possibility that circumstances might arise where the  
10 national security or other interests would warrant  
11 resuming those.

12 What we can say, however, is that we would be  
13 happy to provide notice to the other side and to the  
14 Court, if we have an intent to resume any such  
15 interviews, and we could deal with that issue at  
16 that time in the context of whatever those  
17 circumstances might be.

18 So what I would say is at least for now that the  
19 issue is not moot; it's at least not ripe. And that  
20 we could put that issue on the back burner, if you  
21 will, and if it comes up, we could deal with it at  
22 that time.

23 THE COURT: Are you saying that the Court would  
24 have some role other than just notice?

25 MR. SALMONS: Well, I'm assuming, Your Honor,



1 that at that point the relief that they were seeking  
2 with that -- I don't have their petition in front of  
3 me -- but as I recall it was essentially an  
4 injunction ordering the Government not to have  
5 further interrogations or interviews with Mr.  
6 Padilla, would become ripe; they would then want to  
7 prep that in some sort of expedited way, would be my  
8 assumption, and then we could deal with that issue,  
9 if it arises, under the context and specific facts  
10 that we would have present at that time.

11 We don't have an issue of putting issues before  
12 the Court just for the sake of its resolution. The  
13 only reason that I can foresee where that need would  
14 arise, this would not be the decision obviously made  
15 by attorneys in this case, this would be based on  
16 the folks that are involved in the national security  
17 issues and the intelligence issues that, you know, a  
18 particular plot or particular circumstance has come  
19 up where they think there may be a justification for  
20 resuming those; and we could deal with that issue at  
21 that time.

22 THE COURT: Well, I guess what I'm saying is,  
23 are you willing to agree or stipulate or consent,  
24 however you want to put it, that there will be no  
25 further interrogations of Mr. Padilla, without

1 giving notice and an opportunity for a hearing in  
2 the Court?

3 MR. SALMONS: Yes, Your Honor, I think that is  
4 what I'm representing. Now, there may be, you know,  
5 depending on the urgency of the situation, there may  
6 be some need for an expedited handling of that or  
7 the like, but -- because at this point in time we  
8 don't foresee it even coming up, but if it were, I  
9 would think we would provide notice and then we  
10 would try to get it resolved as quickly as possible.

11 THE COURT: Okay. And I certainly would do  
12 everything I could to expedite it, and I'm sure  
13 counsel for the petitioner would do the same. Would  
14 that suit you, would that remove that issue from the  
15 table, if they make that concession?

16 MR. FREIMAN: Yes, I believe it would, Your  
17 Honor.

18 THE COURT: Okay. So can we put that in stone  
19 and make that the rule of the case now, that there  
20 will be no more interrogations of Mr. Padilla  
21 without giving notice and opportunity for a hearing  
22 in court, and with the agreement that everyone will  
23 expedite it at the Government's request.

24 MR. SALMONS: That's fine with the Government,  
25 Your Honor.

1 MR. FREIMAN: That's fine with petitioner, Your  
2 Honor.

3 THE COURT: Okay, good. Now then, let me talk  
4 about representation. What is -- I am not positive  
5 that I understand what the extent of attorney-client  
6 relations are at this point in time; maybe you can  
7 tell me, Mr. Patel.

8 MR. PATEL: Your Honor, I've actually had some  
9 discussions on this issue with members of the  
10 Department of Justice, as well as with members of  
11 the military JAG officers that we've been dealing  
12 with. And I think the clearest statement of the  
13 current status of that attorney-client relationship  
14 is it seems to be in transition right now.

15 But I think for the purposes of what we need to  
16 do today, Your Honor, is that issue, as well as the  
17 issue of whatever discovery might be necessary, if  
18 we were to proceed with a fact hearing, that that  
19 can be tabled, because the issue that we'll be  
20 briefing that Your Honor will eventually decide,  
21 would ultimately be, if granted, dispositive of the  
22 attorney-client issue as well.

23 THE COURT: You have greater faith in the power  
24 of my decisions than I do. I don't think it will  
25 be, and I think this will be an issue that continues

1 to linger.

2 What is the Government's position with regard to  
3 representation, or attorney-client relations, I  
4 guess I should say.

5 MR. SALMONS: Your Honor, again, this is David  
6 Salmons. Our understanding at this time is that  
7 petitioner's counsel have been -- have the ability  
8 to visit with him, that those visits are currently  
9 not being monitored in any sort of realtime way.

10 There is a question that Mr. Patel raised with  
11 us, we're going to undertake to try and get some  
12 clarification on, as to whether or not -- had to do  
13 with the handling of attorney notes.

14 The concern, Your Honor, has to do with his  
15 classification issues with regard to national  
16 security-related information. And if the counsel  
17 were to take notes from their meeting, there may be  
18 a need to house those notes in a secured facility  
19 and treat them as national security-related  
20 information, or to at least have them submitted to a  
21 privilege team that would be walled off from any of  
22 the litigation issues related to Mr. Padilla, so  
23 that they could be properly classified. If they're  
24 unclassified, then they could be handled by the  
25 attorneys as such in their offices and the like.

1 And so there are a couple of issues we're  
2 working out. For the most part though I think it's  
3 clear that they do have access to Mr. Padilla, and  
4 for purposes of the way in which petitioner's  
5 counsel represented they want to produce, they're  
6 comfortable with, I think -- they can clarify this  
7 -- but I believe they're comfortable with the access  
8 issues, at least with regard for the motions they're  
9 intending to file first. And as we continue to try  
10 and sort out some of the details with regard to  
11 national security information, we're hopeful that we  
12 can do so without the need for any further  
13 involvement of the Court.

14 THE COURT: You said a lot there, so let me go  
15 back to the beginning. First of all, you said that  
16 counsel at this time may visit and not be monitored  
17 in a realtime way. What do you mean?

18 MR. SALMONS: Your Honor, all I meant by that is  
19 that there's no audio monitoring of petitioner's  
20 counsel visits at this time. There were initially  
21 when the visits first started, to make sure that  
22 information that was being conveyed were within  
23 security clearance levels of the counsel, and to  
24 make sure that there weren't any attempts to further  
25 ongoing terrorist activities through passing coded

1 messages and the like.

2 After a period of time, it's my understanding,  
3 Your Honor, that both the Department of Defense  
4 personnel and the counsel were comfortable with the  
5 way in which the interviews and the counsel visits  
6 were proceeding, and a determination was made,  
7 because of that, there was no continuing need to  
8 monitor. And so that has now ceased. And so the  
9 visits at this time are not monitored, they're, you  
10 know, as they normally would be.

11 There are, I believe, and Mr. Patel can clarify  
12 this, I think there are Department of Defense  
13 personnel outside the door in case there are any  
14 security issues. And I think they reserve the  
15 ability to have a video monitor, again, for the same  
16 reason, without any audio, but the actual content of  
17 the communications are not being monitored.

18 THE COURT: Mr. Salmons, I appreciate your  
19 response. It's clear that you're well suited for  
20 the Solicitor General's office, because you give me  
21 more information than I need at this low level. All  
22 I really want to know is this. Are they currently  
23 recording -- apparently what you're telling me is  
24 they're not, in a realtime sense, that is, not at  
25 the same time they're meeting, monitoring the

1 conversations between counsel and client. Are they  
2 recording conversations between counsel and client,  
3 audio or video? And if you can give me that answer  
4 in thirty words or less, that would be great.

5 MR. SALMONS: Your Honor, I apologize if I was  
6 not clear.

7 THE COURT: No, you were --

8 MR. SALMONS: My understanding is there is no  
9 audio recording of the counsel visits, and that -- I  
10 don't know whether there is any video recording. If  
11 there is video -- I don't think they're recording  
12 it, but I think there are -- there may be videos in  
13 the room, and there's, you know, someone there that  
14 just makes sure that there's no harm to the counsel  
15 or anyone else. I'm not sure whether that is still  
16 ongoing or not.

17 THE COURT: When you say there's someone there,  
18 are they in the room or outside the room?

19 MR. SALMONS: I believe they are outside the  
20 room. Mr. Patel may be in the best position to tell  
21 us how that has worked. My understanding is there  
22 is no one in the room, that there is no audio  
23 recording of the conversation.

24 THE COURT: Let me ask you this. Mr. Patel, I  
25 assume, has top secret clearance now, is that right?



1 MR. PATEL: Your Honor, I have -- clearances are  
2 given out on as-needed basis. What I have been told  
3 by the security people at the Department of Justice  
4 is that the Department of Defense said that we  
5 needed secret clearance, although we've been  
6 cleared, and if that changes and they need top  
7 secret -- we need top secret, that is a matter of  
8 signing a form, and it can be accomplished in a  
9 matter of minutes.

10 THE COURT: What I'm trying to do is this; find  
11 out if there is an objection to having counsel for  
12 the petitioner who have the appropriate level of  
13 Department of Defense clearance, which I suppose  
14 is -- or national security clearance, which I  
15 suppose from what Mr. Patel says is secret, meeting  
16 in an unmonitored and unfettered way with his  
17 client, under appropriate security conditions. By  
18 that, security, I mean safety for the parties  
19 involved, as well as prevention of escape and that  
20 sort of thing with regard to the petitioner.

21 Is there any objection to that, Mr. Salmons?

22 MR. SALMONS: Your Honor, my understanding is  
23 that's precisely where we are at. Mr. Patel, I  
24 don't know if he'll so stipulate, that was my  
25 understanding of how he chose as well, but he can



1 clarify that.

2 THE COURT: Tell me, Mr. Patel, how is it  
3 working?

4 MR. PATEL: Believe it or not, Your Honor, the  
5 reason I hesitate to answer is I'm not quite sure.  
6 Brig operations are somewhat different from national  
7 security operations, and they're rather touchy about  
8 that. My understanding -- I have been meeting in a  
9 room with Mr. Padilla -- which is how his mother  
10 tells me his last name is actually pronounced.

11 THE COURT: Thank you.

12 MR. PATEL: He is -- we are alone in the room,  
13 there is a video camera in the room. My  
14 understanding is that camera was not being used in  
15 any way. He is secured in place, although his hands  
16 are free. And outside one -- outside the door there  
17 is a wall, a glass, although darkened glass, window,  
18 and that there are two military people standing  
19 outside the hallway. It's my understanding that  
20 they cannot hear our conversations. And that's the  
21 physical structure of how that's working.

22 To date, the way we have handled the national  
23 security issues, or the potential national security  
24 issue is, we have agreed not to take notes.

25 And the reason for that is, in the normal

1 national security, when you're dealing with  
2 classified information, it's rather clear. A  
3 document has been determined by the appropriate  
4 Government official that this is classified  
5 material, and it is stamped with its classification  
6 rating. So it would be stamped secret or top secret  
7 or whatever is determined to be appropriate.

8 In the situation where we're talking to an  
9 individual who clearly does not have classification  
10 authority, that is, Mr. Padilla does not have the  
11 authority to say what is or is not classified, it  
12 becomes a little more difficult.

13 And this is -- and I think what -- for our  
14 current purposes we can continue to work on the  
15 model that we have been working on, but if we  
16 proceed further, then we will have to revisit this  
17 promptly. There's something else that I think Mr.  
18 Freiman, I think, wanted to add on this.

19 THE COURT: Mr. Freiman?

20 MR. FREIMAN: Thank you, Your Honor. There are  
21 two things that I would add. One is vis-a-vis the  
22 notes. There are a couple of federal statutes that  
23 could at least plausibly be thought to govern this  
24 situation, the Classified Information Procedures Act  
25 and the National Security Act.

1 The guidance that Mr. Patel and Ms. Newman  
2 initially received by way of the documents setting  
3 the conditions for their terms of access, was a  
4 document that did not seem to draw on those  
5 statutory backgrounds.

6 THE COURT: Well, you know, I'd rather be  
7 prospective than retrospective. I'm trying to set  
8 out some guidelines for us to go forward with in the  
9 future. And, you know, I don't want to rehash old  
10 wounds.

11 MR. FREIMAN: Fair enough.

12 THE COURT: If there are old wounds there.

13 MR. FREIMAN: Understood.

14 THE COURT: What I'd like to know is, is this  
15 arrangement satisfactory for the time being. Mr.  
16 Patel?

17 MR. PATEL: For the time being, it is, Your  
18 Honor.

19 THE COURT: All right. Now then, can you agree  
20 and the Government agree that there will be no  
21 change in these current arrangements without an  
22 opportunity for notice and a hearing in court?

23 Mr. Shealy, you wanted to say something.

24 MR. SHEALY: Yes, sir. I think we can agree to  
25 that.

1 THE COURT: Mr. Patel?

2 MR. PATEL: Your Honor, I would agree with that,  
3 except I actually have some good news to inform Your  
4 Honor. There seems to be, as I said initially, some  
5 evolution going on here, and I view it as positive,  
6 that it's increasing our ability to have access and  
7 communicate with Mr. Padilla.

8 To the extent that that -- the changes are in  
9 that nature, is really, I would submit, really not  
10 necessary for us to burden the Court with good news.

11 THE COURT: Well, I certainly agree. I  
12 certainly agree. All I'm saying, I'm trying to set  
13 a minimum standard, and that if it drops below that  
14 minimum standard, that you will then have the  
15 opportunity, before it is enacted, before it is  
16 imposed, to be told about it and have a chance to  
17 bring it before the Court. Is that agreeable?

18 MR. PATEL: It is, thank you, Your Honor.

19 THE COURT: Okay. Now, does that resolve in  
20 large part the issue on the -- in your petition?

21 MR. PATEL: It certainly tables it sufficiently  
22 for the time being, Your Honor.

23 THE COURT: Okay. Now, the elephant in the room  
24 that nobody wants to talk about is the factual  
25 basis, factual -- the opportunity that the Supreme

1 Court said that Mr. Hamdi has, and that we all --  
2 that is the touchstone of all of these hearings, and  
3 that is the opportunity to challenge an erroneous  
4 detention on the part of the Executive.

5 I understand that you gentlemen are -- everyone  
6 is eager to go forward with the legal issues. What  
7 I would like to do is talk about some method of  
8 assuring that Mr. Padilla's due process rights are  
9 protected, that he has notice, that he has  
10 opportunity at least for some preliminary type of  
11 review of the factual issues.

12 So far, the Government has submitted its  
13 affidavit. The only thing from the petitioner is in  
14 his -- if I'm -- if -- unless I've overlooked  
15 something -- is the assertion in the petition that  
16 he denies all of the facts. I understand that  
17 there's concern about the nature of the evidence  
18 that's been presented to the Court, its hearsay  
19 nature, but hearsay evidence is not no evidence. I  
20 mean, every day of the week we put people in jail on  
21 hearsay evidence, because that's what is allowed at  
22 a preliminary hearing and detention hearings; in  
23 many administrative hearings, hearsay evidence is  
24 admissible. So that doesn't mean the evidence is  
25 inadmissible, it just means that it may not be of as

1 high quality. And the Supreme Court seemed to  
2 indicate in Hamdi that hearsay evidence was -- might  
3 be appropriate. //

4 I'd like to know -- I'd like to either, one,  
5 have some representation that Mr. Hamdi does not  
6 want that type of hearing, or at least talk to y'all  
7 about proceeding with some sort of preliminary  
8 hearing for him. Because if he's wrongfully  
9 detained, factually wrongfully detained, we all do  
10 him a disservice by not providing him that due  
11 process hearing.

12 Now, I'd be glad to hear y'all's comments on it.  
13 Mr. Shealy, do you want to say something?

14 MR. SHEALY: I guess Mr. Patel addressed this.  
15 My discussions with Mr. Salmons and Sri Srinivasan,  
16 who are still on with us, is that for purposes of a  
17 summary judgment motion or something like that,  
18 which they intend to file very soon, in the next few  
19 weeks, that the Court rely upon the facts as stated  
20 in the Government's response and attachments at this  
21 time to resolve that. If they are willing --

22 THE COURT: But as I understand it, the summary  
23 judgment motion will be directed solely at the  
24 presidential authority, it will not be addressed at  
25 whether or not Mr. Padilla has been wrongfully

1 detained factually by the Executive. That's all I'm  
2 saying. And here he's been there for two years and  
3 nobody has -- he denies it, and nobody has said, you  
4 know, well, maybe there's a mistake.

5 MR. SHEALY: I understand that. And I -- maybe  
6 Mr. Patel can do that. I think they're representing  
7 their client diligently, and --

8 THE COURT: I certainly don't imply that.

9 MR. SHEALY: And I think that he can certainly  
10 correct me, but my understanding is, for purposes of  
11 that legal issue, to the extent the facts  
12 are relevant to that issue --

13 THE COURT: I understand that, but I'm not  
14 addressing that legal issue. I'm addressing the  
15 second claim in their petition, which is that he has  
16 been denied his due process rights because he has  
17 not been given notice, and he has not had an  
18 opportunity to contest the facts.

19 MR. PATEL: Here is the problem, Your Honor.  
20 The discovery issues, the access to counsel issues,  
21 are enormous.

22 THE COURT: Well, first of all, let me interrupt  
23 you, if I may. The Supreme Court in Hamdi says  
24 that -- suggests that the Court approach these  
25 things in a -- and this is my word -- a stepped



1 manner, a manner that might increase from the lesser  
2 to the greater. And I understand that discovery  
3 before a full blown evidentiary hearing may be a  
4 problem. However, there has to be -- the Government  
5 has presented facts tending to show, even in the  
6 form of hearsay and affidavits, tending to support  
7 his position. So far there's been nothing, and your  
8 petition says no opportunity for you to present  
9 anything. And I want to give you that opportunity  
10 and find out how to meet that allegation.

11 Because, quite frankly, I don't want this case  
12 to be, two years from now, before the United States  
13 Supreme Court, with your saying he's been before the  
14 District Court in New York, the Appellate Court in  
15 New York, the District Court in South Carolina, the  
16 Appellate Court in South Carolina, and never had an  
17 opportunity to contest these charges. That's what I  
18 don't want. I want him to have that opportunity, or  
19 I want you to do something to remove that issue.

20 MR. PATEL: I cannot remove that issue, Your  
21 Honor.

22 THE COURT: I didn't think you would. I didn't  
23 expect you to, but I can't remove the other one.

24 MR. PATEL: And if we're going to -- the first  
25 step in addressing that issue is we have to address



1 the counsel issue.

2 THE COURT: Well, that's what I -- that's why I  
3 addressed it.

4 MR. PATEL: Right.

5 THE COURT: And I thought you said you were  
6 happy with it.

7 MR. PATEL: But, Your Honor, I'm happy with it  
8 for the purposes of dealing with the critical legal  
9 issue of presidential authority.

10 THE COURT: Tell me what you need to address it  
11 from the other standpoint.

12 MR. PATEL: Attorney-client privilege.

13 THE COURT: Well, what's the Government's  
14 position with regard to attorney-client privilege?

15 MR. SALMONS: Your Honor, I'm not sure I  
16 understand exactly what the concern is.

17 THE COURT: Well, as I understand attorney-  
18 client privilege, that means that anything that Mr.  
19 Padilla tells Mr. Patel or any of his other  
20 attorneys that are properly secured, cannot be  
21 divulged by those attorneys. Is that not your  
22 understanding of it, Mr. Patel?

23 MR. PATEL: Yes, Your Honor.

24 THE COURT: Okay.

25 MR. SALMONS: Again, Your Honor, I'm not sure

1 exactly why it is that the procedures that we worked  
2 out today, I understand that there are still some  
3 questions Mr. Patel had raised, and we're trying to  
4 work through with regard to the handling of national  
5 security-related information, but given that there's  
6 no monitoring presently, I'm not sure why it is that  
7 current counsel access would be viewed as deficient,  
8 from the standpoint of attorney-client privilege.

9 THE COURT: We're not talking about access,  
10 we're talking about privilege. And that is whether  
11 Mr. Patel, for example, has the right not to answer  
12 your questions as to what his client told him.

13 Of course, there are exceptions to the  
14 attorney-client privilege, there's the crime/fraud  
15 exception and all sorts of exceptions. But basic  
16 common law attorney-client privileges, I don't  
17 know -- the reason I asked the Government is, I  
18 don't know where this comes from, what his fear is,  
19 but apparently there's some fear that the  
20 Government -- that the attorney-client privilege  
21 will not lie.

22 Mr. Shealy, do you want to add something to  
23 this?

24 MR. SHEALY: Your Honor, I think that going back  
25 to what Mr. Patel said and what Mr. Salmons is

1 articulating, those are difficult issues. We both  
2 understand that, both sides, Mr. Patel and  
3 ourselves. And I think that's why we have proposed  
4 what we have proposed to the Court today, pursuant  
5 to Hamdi, is to deal first on a very limited basis  
6 with presidential authority. Indeed, the defendant,  
7 the petitioner, is willing to proceed that way.

8 THE COURT: Well, let me ask this then. Will  
9 the petitioner consent or agree that he will not, in  
10 the future, argue that Mr. Patel has not been  
11 given -- Mr. Padilla has not been given an  
12 opportunity to exercise his due process rights?

13 MR. FREIMAN: Your Honor, we would agree not to  
14 make that as a tactical point before a Circuit  
15 Court, claiming that the justice system had somehow  
16 failed our client, given Your Honor's willingness  
17 and enthusiasm for conducting an evidentiary  
18 hearing.

19 We would not, of course -- and I don't think you  
20 meant to intend this; I say this out of an abundance  
21 of caution -- we would not, of course, in some way  
22 withdraw our claim that he is entitled to a due  
23 process -- to an appropriate hearing consistent with  
24 due process, should Your Honor find what the  
25 President does, in fact, have the power to detain

1 him.

2 THE COURT: Well, does not due process involve  
3 timeliness? Is not the famous statement that  
4 justice delayed is justice denied?

5 MR. FREIMAN: Yes, it does, Your Honor.

6 THE COURT: Then how can you take that position?  
7 And if you think he has a right to a due process  
8 hearing, how can you give it up so cavalierly?

9 MR. FREIMAN: We don't intend to give it up, we  
10 intend simply to have --

11 THE COURT: Well, you're delaying it, denying  
12 it, which is the same as giving it up.

13 MR. FREIMAN: We're --

14 MR. PATEL: Your Honor, our intention -- it is  
15 our belief that the fastest way we can obtain relief  
16 for our client is to have the issue of presidential  
17 authority determined.

18 MR. O'CONNELL: Your Honor, this is Michael  
19 O'Connell. May I offer something?

20 THE COURT: Yes.

21 MR. O'CONNELL: My perception of this is that in  
22 order to test his detention, they're going to have  
23 -- we're going to have to have extensive discovery,  
24 which is going to take, I'm gathering, a long period  
25 of time.

1 If we approach it the way that's been suggested,  
2 everything as far as the presidential authority is  
3 concerned, will have been submitted either to the  
4 Court in late November, and the decision can then be  
5 made.

6 If we have to test -- if we have a due process  
7 hearing now, it's not going to be now, it's going to  
8 be months and months while we all engage in  
9 discovery.

10 THE COURT: Well, it depends on the nature of  
11 the due process hearing, Mr. O'Connell.

12 MR. O'CONNELL: That's right, but --

13 THE COURT: And depends on the structured  
14 approach. I don't see why we can't -- you know,  
15 I -- there are lots of ways to skin this cat, and  
16 there are lots of ways to proceed with these types  
17 of hearings. And I don't frankly -- I'll throw this  
18 out. It is unfair to the Government to require them  
19 to have their witnesses on hold for years and years,  
20 while this matter is litigated on a legal issue.

21 Memories fade, witnesses die, people disappear, and  
22 it's just as unfair to them as it is to Mr. Padilla.

23 Now then, if there is some -- if what you're  
24 saying, and I don't mean to put words in your mouth,  
25 and I don't think this is what you're saying, you

1 admit the matters in the Government's petition, and  
2 that that admission will lie in any future  
3 evidentiary hearing, well, that's fine. And that  
4 you don't want -- and that you waive contesting it.  
5 But so far, Mr. Padilla has submitted zero, no  
6 affidavits, no hearsay, nothing, to -- except, as I  
7 said, the denial in the petition you submitted for  
8 him.

9 MR. PATEL: Your Honor, it is not our intention  
10 to do what you just suggested. We do it not --

11 THE COURT: And as you also note, the Supreme  
12 Court is loath to reach a constitutional issue if it  
13 doesn't need to.

14 MR. FREIMAN: Yes, Your Honor. It may be that  
15 we read the Hamdi decision somewhat differently than  
16 you do.

17 THE COURT: Well, listen, I think all nine of  
18 the justices read it differently than each other, so  
19 that's not a surprise.

20 MR. FREIMAN: Yes, Your Honor, so as to the  
21 questions of the appropriate process in a hearing,  
22 while Justice O'Connor's plurality does say that  
23 hearsay is appropriate, presumptions could be  
24 appropriate under certain circumstances, it's also  
25 true that she was speaking only for four justices at

1 that point. Her resolution of the issue of  
2 presidential power to detain was joined by Justice  
3 Souter and Justice Ginsburg, thereby creating the  
4 majority. On the process issues there was no fifth  
5 voice joining her, so those issues are entirely  
6 undecided at this point.

7 THE COURT: And I -- if you're telling me that  
8 the Supreme Court does not give complete guidance to  
9 the lower courts, that's not a new issue, not a new  
10 statement, so I'm fully aware of that.

11 MR. FREIMAN: Yes, Your Honor. So I raise this  
12 only to say that we would, in fact, intend to  
13 vigorously litigate the question of whether hearsay  
14 would be acceptable in a hearing, and as well to  
15 vigorously litigate the availability of discovery  
16 prior to any such hearing. Adequate discovery.

17 THE COURT: Let me ask you this. Can you  
18 forecast in any type of legal manner, that there is  
19 evidence to dispute the Government's factual  
20 assertions?

21 MR. FREIMAN: Your Honor, it is impossible to  
22 know until we have an opportunity to conduct  
23 discovery.

24 THE COURT: Wait a minute. You answered, you've  
25 raised the issue in your petition that he denies it.



1 MR. FREIMAN: That's the basis that we have,  
2 Your Honor.

3 THE COURT: And so I asked you if there is any  
4 factual basis for that denial.

5 MR. FREIMAN: There is a footnote in the -- in  
6 the pleading presented by the -- by what was Deputy  
7 Attorney General James Comey's remarks, is that  
8 where the footnote initially appears? Saying that  
9 Mr. Padilla disagrees with what the Government sets  
10 forth as the facts. That is our factual basis, the  
11 Deputy Attorney General's own statement.

12 MR. PATEL: Your Honor, we're a little bit  
13 between a rock and a hard place here, because other  
14 than a general denial, we get back to whatever Mr.  
15 Padilla says is potentially classified and has to go  
16 through screening process.

17 THE COURT: That's not stopping anything else in  
18 this case.

19 MR. PATEL: Well, actually --

20 THE COURT: Or in any of the other cases. I've  
21 got -- you know, we all have gotten secret  
22 information.

23 MR. PATEL: It's -- it has stopped us, Your  
24 Honor. And one of the first --

25 THE COURT: Well, that's what I want to do is



1 open it up for you so that you can proceed.

2 MR. PATEL: Well, one of the first issues is the  
3 process that Mr. Salmons has outlined, we believe,  
4 is unlawful and intrusive, and that there is no --

5 THE COURT: What process is that?

6 MR. PATEL: The process of a screening team or  
7 privilege team. We believe that whatever Mr. --

8 THE COURT: Well, then why didn't you say so?

9 MR. PATEL: Your Honor, that's one of the  
10 myriad of issues that we can speedily sidestep by  
11 resolving the authority issue. I mean, we could  
12 be --

13 THE COURT: Speedily sidestepping is not the  
14 nature of a democracy. Speedily sidestepping is  
15 what got you to South Carolina. Okay? So we don't  
16 want to do that; we want to do what's right. And if  
17 I'm all wrong, Mr. Salmons, tell me, because I don't  
18 want to be the -- you know, the wild card or the odd  
19 man out. Is there something wrong with wanting Mr.  
20 Padilla to have his due process?

21 MR. SALMONS: Your Honor, what I would say, I  
22 guess, is this. It seems to me that from a general  
23 due process standpoint, the fact that Your Honor in  
24 this habeas proceeding is providing this opportunity  
25 for Mr. Padilla, through counsel, to challenge his

1 detention both legally and factually, provides all  
2 the process that is due. And certainly the Hamdi  
3 decision, I think, makes that clear, that whether or  
4 not Mr. Padilla, through his counsel, would prefer  
5 to go first with some legal issues and present them  
6 to the Court and have those resolved through a  
7 summary judgment type process, or would like more of  
8 a factual development first through a due process  
9 hearing, it seems to me to be the type of decision  
10 that litigants make every day. And those types of  
11 decisions don't necessarily implicate due process,  
12 because he's got the opportunity and he's made the  
13 decision to proceed with the legal arguments first,  
14 and so he can't really complain about any delay that  
15 follows from that.

16 From the Government's standpoint, Your Honor --

17 THE COURT: They have, in all the petitions  
18 they've filed with me, while they were arguing up in  
19 New York they filed petitions, every petition starts  
20 off, Mr. Padilla has been held unconstitutionally  
21 for two years without due process. Every petition  
22 starts that way.

23 MR. SALMONS: I understand that, Your Honor. I  
24 think what I would say from the Government's  
25 perspective is we're happy to proceed either way.

1 It does seem to us that it's not uncommon in habeas  
2 and other cases where one of the parties has an  
3 argument where the petitioner has an argument that  
4 says under any circumstance, under any set of facts,  
5 the detention is unlawful, to go ahead and proceed  
6 through some type of a summary judgment mechanism to  
7 resolve that issue. We have no objection to that,  
8 that is certainly, it seems to me, a rational way in  
9 which this case could proceed. And it's hard to see  
10 how that part of the proceeding could come to any  
11 violation of due process, since that's what the  
12 petitioner's asked for.

13 And so I really do see it in terms of whether we  
14 go forward first on the legal issues or summary  
15 judgment, or we go forward first through some sort  
16 of a modified or limited due process hearing, as  
17 Your Honor has raised, is sort of a litigation  
18 judgment that parties make all the time. We don't  
19 have an objection to proceeding either way. And we  
20 can see some benefits to getting the legal issue out  
21 of the way as soon as possible.

22 THE COURT: Well, of course, this is not like  
23 most habeas petitions. I know there are some, but  
24 most habeas petitions come fully litigated with the  
25 trial record or some sort of record behind it.

1 MR. SALMONS: That's right, Your Honor.

2 THE COURT: That is, at least in the 2254 arena,  
3 has a presumption of correctness.

4 MR. SALMONS: That's right, Your Honor.

5 The other thing I would just add quickly is that  
6 it seems to us that the line in the Hamdi plurality  
7 that makes reference to lower courts proceeding in a  
8 prudent -- I believe the quote is both prudent and  
9 incremental --

10 THE COURT: Right.

11 MR. SALMONS: -- fashion, is broad enough to  
12 allow either the sort of summary judgment type  
13 approach first, and then getting to the factual  
14 development, or the way Your Honor was mentioning.

15 It would seem to me that at the end of the day  
16 these are the types of issues that, you know, Mr.  
17 Padilla, in consultation with his counsel, get to  
18 make. And it's not a due process issue that he  
19 decides to go with the legal argument first,  
20 followed up by his factual challenge, or the other  
21 way around.

22 THE COURT: Well, you know, I understand what  
23 you're saying. From a practical standpoint it is an  
24 inefficient use of judicial resources to bifurcate  
25 issues like this, and to send them up when you know

1 they're going to go all the way to the United States  
2 Supreme Court, no matter what the results are. And  
3 so what you're doing is you're saying we want to  
4 litigate the legal issues all the way to the United  
5 States Supreme Court, and then, if we have to, come  
6 back and litigate all the factual issues all the way  
7 up to the United States Supreme Court, including the  
8 processes and the whole thing.

9 MR. SALMONS: Your Honor --

10 THE COURT: The result is going to be that  
11 Mr. -- and as all of us should understand, the  
12 result is going to be that if they lose -- if the  
13 strategic decision to go forward on the legal issue  
14 proves to be a losing decision, then Mr. Hamdi is  
15 going to be in jail for anywhere from four to six  
16 more years. And I think we ought to lay that on the  
17 table so that everybody knows that that's what the  
18 decision making is all about, so we won't come back  
19 later crying in our beer that Mr. Hamdi, poor Mr.  
20 Hamdi has been kept in -- I mean Mr. Padilla -- has  
21 been kept in jail all this time because counsel has  
22 made a strategic decision to proceed this way. And  
23 that's all I want to get clear on the table.

24 MR. SALMONS: I think Your Honor is accurate in  
25 the way you describe the choices that they may be



1 making.

2 I guess the one thing I would add, Your Honor,  
3 is that at least at this early stage, the only  
4 decision that's been made is how -- is the request  
5 for this Court to proceed in a certain order.

6 If the Court, for example, were to determine  
7 that the President does have the authority to detain  
8 Mr. Padilla, the question of whether to certify that  
9 question for a round of appellate review now, or to  
10 proceed with factual development at that time, I  
11 would -- I think it would still be on the table, and  
12 we can address that then.

13 But I think Your Honor accurately described the  
14 sort of litigation judgment that petitioner's  
15 counsel is making.

16 THE COURT: Well, I see that Mr. Patel and Mr.  
17 Freiman are shaking their heads yes. Do you, by  
18 shaking your heads yes, do you perceive under any  
19 circumstances that if I were to rule that the  
20 President's authority was -- the President had the  
21 authority to do what he's done, that you would then  
22 want to go straight forward into an evidentiary  
23 hearing? Is that even within the realm of  
24 imagination?

25 MR. FREIMAN: Your Honor, I don't think, in all

1 candor, that that would be our choice at this time.

2 THE COURT: I don't think so either.

3 MR. FREIMAN: We would seek interlocutory  
4 review. But Your Honor's determination of whether  
5 that was appropriate, and the arguments for and  
6 against that review, could be held until that time.

7 THE COURT: I understand, but -- all I'm saying  
8 is that I don't think that there's any --

9 MR. PATEL: Your Honor, if I could make --

10 THE COURT: You know, we're making the decision  
11 now. If we're going to go down this road, I'm sure  
12 y'all are going to want it to go all the way up, and  
13 then the argument six months from now, after we've  
14 gone through the legal issues, is going to be much  
15 more intense to go forward than it is now, with any  
16 evidentiary matters.

17 I just want the table to be clear and make sure  
18 everybody understands before I issue any scheduling  
19 orders.

20 MR. PATEL: Your Honor, it could also be that --  
21 and I haven't had a chance to talk to the Government  
22 about this, or even to my co-counsel. So I just  
23 propose this as a thought balloon. That we could --  
24 I would like to have discussions with the Government  
25 and with my co-counsel, that a second track, which

1 would essentially be to start raising some of  
2 these -- some of the due process issues that Your  
3 Honor's concerned.

4 Part of my concern and part of my reason that I  
5 don't want the litigation to stop, that I would like  
6 the authority issue to go forward, is especially as  
7 to the counsel, which is almost a first step, that's  
8 an issue in flux. And we may not need to litigate  
9 that, because we may be able to come to an agreement  
10 about that.

11 THE COURT: The issue with regard to counsel?

12 MR. PATEL: Yes.

13 THE COURT: What issue is there?

14 MR. PATEL: Excuse me, Your Honor?

15 THE COURT: What issue is there? I thought we  
16 were -- I thought that it was resolved, and the only  
17 question that you asked was whether there was  
18 attorney-client privilege, and I heard nobody say  
19 that they did not think attorney-client privilege  
20 lay in this case.

21 MR. PATEL: Except, Your Honor, as to the  
22 privilege team. And --

23 THE COURT: Well, that's not an issue at this  
24 point, that's -- it's not even in place. Is it, Mr.  
25 Salmons, is there -- if he takes notes, what's going



1 to happen?

2 MR. PATEL: Your Honor, I think I may be able to  
3 answer that question better.

4 THE COURT: I'd rather hear it from the  
5 Government.

6 MR. PATEL: Okay.

7 MR. SALMONS: Your Honor, I'm sorry, in that  
8 exchange I couldn't quite make out exactly what the  
9 question was.

10 THE COURT: If Mr. Patel meets with Mr. Padilla  
11 and takes notes, what is the Government's position  
12 with his attorney-client privilege right, with  
13 regard to the information contained in those notes?

14 MR. SALMONS: Your Honor, let me try and answer  
15 it this way. And I'm not entirely sure what the  
16 current status is with regard to whether those notes  
17 would be subjected to a privilege team review, so  
18 that they could be properly classified. But it  
19 seems to me that the issue is not one of attorney-  
20 client privilege, but is one of identifying and  
21 properly handling and storing national security-  
22 related information. That happens in criminal  
23 cases, that happens in civil cases, and that's not  
24 an issue about attorney-client privilege, it's --  
25 and it's a very -- the intelligence team that would

1 review the material is a privilege team that would,  
2 you know, be walled off from any litigation. And  
3 any information that would be contained in those  
4 notes would not be involved, from the Government's  
5 standpoint, in any of the proceedings involving Mr.  
6 Padilla.

7 As you just stated, the attorney-client  
8 privilege is being acknowledged -- not acknowledged,  
9 but at least protected, any argument about the  
10 attorney-client privilege, because we're keeping --  
11 you know, it's not going to get into the hands of  
12 the folks involved in these cases.

13 And whether or not that is a requirement that's  
14 still going to be in place, is a question that we  
15 were discussing with Mr. Patel yesterday, and we're  
16 going to undertake to try and resolve, without the  
17 Court's involvement. But it doesn't seem to me to  
18 really be a question of attorney-client privilege.  
19 Nothing in the agreement says that there's no  
20 attorney-client privilege, or that Mr. Patel or the  
21 other counsel could be forced to disclose anything  
22 that Mr. Padilla tells them. It only speaks in  
23 terms of monitoring and in terms of identifying and  
24 properly handling national security information.

25 MR. FREIMAN: Your Honor, if I may, with all due

1 respect, I disagree with the factual  
2 characterization of the conditions of access. There  
3 is a clause near the end of those conditions that  
4 explicitly reserves for the Government the  
5 opportunity to contest the availability of the  
6 attorney-client privilege. I believe Your Honor has  
7 that as one of the exhibits filed under seal to our  
8 reply. However --

9 THE COURT: As a matter of fact, those exhibits  
10 were sent back because they were not filed under --  
11 in accordance with the local rules. You just can't  
12 dump something on us and say it's under seal. You  
13 have to file a motion for leave to file something  
14 under seal and say why. I'm not going to open up an  
15 envelope, not knowing -- having any idea what's in  
16 that, because the next thing you know, I'm  
17 disqualified from hearing the case because  
18 somebody's dumped something on my desk in an  
19 envelope without following the procedure. So I  
20 haven't seen those documents.

21 MR. FREIMAN: Our apologies, Your Honor.

22 THE COURT: No, that's all right, but I think  
23 the rule -- one of the orders that was issued  
24 originally in this case pointed out the local rule  
25 with regard to sealing documents.

1 MR. FREIMAN: In that case I redouble our  
2 apologies.

3 Your Honor, I wanted to add to that, should Mr.  
4 Salmons' statement suggest that the Government now  
5 recognizes attorney-client privilege, then I mean  
6 obviously the Government has changed its position  
7 since it drafted that document. And if the  
8 Government, in fact, acknowledges attorney-client  
9 privilege, then we're not going to be put between a  
10 rock and a hard place where, if Mr. Padilla were to  
11 say something to Mr. Patel, for example, the  
12 Government could go ahead and subpoena Mr. Patel,  
13 and ask him to testify as to the content of those  
14 communications, and be unable to claim attorney-  
15 client privilege.

16 So if that is, in fact, Mr. Salmons' statements,  
17 we accept that.

18 THE COURT: Well, first of all, I want to get --  
19 I want to lay this on the table. The Government can  
20 always subpoena an attorney and ask him to testify.  
21 The attorney can always claim attorney-client  
22 privilege. And then it's up to the Court to decide  
23 whether he's entitled to it. Because the attorney  
24 doesn't get a blanket decision. And that is always  
25 the risk that every attorney runs in representing

1 any client involved with -- any client. And, if  
2 it's a criminal client, it's doubly so. Because  
3 there are exceptions to the attorney-client  
4 privilege. While it is one of the highest and most  
5 regarded privileges in common law, it is not without  
6 exception.

7 And so if you are holding out for a pure  
8 attorney-client no challenge right, then you're  
9 barking up the wrong tree, you're going in the wrong  
10 direction.

11 Now, what is the Government's position with  
12 regard to this last paragraph in the agreement, Mr.  
13 Salmons?

14 MR. SALMONS: Your Honor, I believe the  
15 paragraph he's referring to simply says that -- in  
16 fact, I'll just read -- I'll read the paragraph I  
17 think he's referring to. It says neither the  
18 reference herein to counsel nor any other part of  
19 these procedures reflect any determination about or  
20 acknowledgement of an attorney-client relationship  
21 between counsel and the detainee.

22 You know, that's just a statement that, you  
23 know, the Government isn't saying one way or the  
24 other whether there's any attorney-client  
25 relationship. But I think if you look at the



1 procedures that are in place, any concern about  
2 attorney-client privilege seems to me misplaced,  
3 because any claimed privilege, it seems to me, has  
4 been accommodated and would have been protected  
5 through this process.

6 Now, there again you're running up into issues  
7 about national security information and those proper  
8 handlings of such information. And courts have to  
9 work those things out all the time. And there are,  
10 you know, generally things in place, including the  
11 need to have some review of written material to make  
12 sure it's properly handled and classified that come  
13 into play. I, again, don't see that as an issue of  
14 attorney-client privilege. And so I -- it seems to  
15 me that the concern about privilege is misplaced.

16 THE COURT: Any response?

17 MR. PATEL: Your Honor, I think my concern is in  
18 my discussions with both the Solicitor General's  
19 office and with the Department of Defense, is the  
20 Government's current view of exactly the status of  
21 the attorney-client privilege and our ability to  
22 communicate with Mr. Padilla, is not clear.

23 THE COURT: Well, what is unclear to you?  
24 Because it seems pretty clear to me.

25 MR. PATEL: Judge, I have an agreement that I

1 had to sign, that indicates that the Government is  
2 not conceding that we have an attorney-client  
3 relationship. If that's changed --

4 THE COURT: That's pretty clear. I mean, that's  
5 clear; it's not unclear.

6 MR. PATEL: But that appears to have changed,  
7 Your Honor.

8 THE COURT: Okay.

9 MR. PATEL: And if that's -- and all I've asked  
10 for is if the Government wants to modify this  
11 agreement in a way that's beneficial to me, just --  
12 I just want to have it in the same form. If someone  
13 could just send me a letter, we now acknowledge that  
14 you have an attorney-client relationship with your  
15 client --

16 THE COURT: Let me ask you this. Are they not  
17 acknowledging that you are -- does the Government --  
18 Let me ask Mr. Salmons. Does the Government not  
19 recognize Mr. Patel as Mr. Padilla's attorney?

20 MR. SALMONS: Your Honor, to my knowledge, it's  
21 not an issue we've contested.

22 THE COURT: Well, it seems to be in that last  
23 paragraph you read me.

24 MR. SALMONS: Your Honor, I just think it says  
25 it doesn't take a position on whether there's an



1 attorney-client relationship with regard to the  
2 access issues.

3 THE COURT: That's a different --

4 MR. SALMONS: There's language --

5 THE COURT: -- Mr. Salmons --

6 MR. SALMONS: If I may just read one other  
7 paragraph to Your Honor.

8 THE COURT: Let me say this, Mr. Patel, there's  
9 a difference between acknowledging an attorney-  
10 client relationship and not taking a position.  
11 Maybe not in Washington, but there is down here.

12 MR. SALMONS: I'm sorry, Your Honor, that was a  
13 question to me or to Mr. Patel? I couldn't hear.

14 THE COURT: To you, Mr. Salmons. There is a  
15 difference in not taking a position, and  
16 acknowledging that there's an attorney-client  
17 relationship.

18 MR. SALMONS: That's -- I understand that, Your  
19 Honor. All I was trying to do was to explain what  
20 the paragraph in the access procedures that was  
21 referred to earlier stated.

22 The procedures also state that where -- when  
23 appropriate, the Department of Defense will monitor  
24 communications between the detainee and counsel to  
25 protect U.S. national security interests, without

1 compromising attorney-client privileged  
2 communications.

3 And so, again, our position is that the  
4 procedures that have been worked out, and especially  
5 now that there's no monitoring going on, are not  
6 inconsistent with any attorney-client privilege.  
7 And we're not contesting, to my knowledge, that --  
8 anything about Mr. Patel's representation. We're  
9 not challenging his ability to represent Mr.  
10 Padilla.

11 THE COURT: Well, let me ask you this. Can you,  
12 on the record, state today that the Government  
13 recognizes Mr. Patel as the attorney for Mr.  
14 Padilla?

15 MR. SALMONS: Yes.

16 THE COURT: Okay. That resolves that issue,  
17 doesn't it, Mr. Patel and Mr. Freiman? Okay.

18 Now then, what other problems do you have in --  
19 that you think stands in the way of your discussing  
20 evidentiary issues with your client?

21 MR. PATEL: The issue of the privilege team,  
22 Your Honor.

23 THE COURT: Well, that is -- will the Government  
24 agree and the petitioner's counsel agree that if  
25 there is a question of national security with regard

1 to any of the notes -- I guess that's all we're  
2 talking about -- or documents given by Mr. Padilla  
3 to his counsel, that they will be sequestered and  
4 not reviewed by counsel for the Government, and will  
5 not be subjected to even national security review,  
6 without a court hearing first? That's not to say  
7 that they -- that's to say they're just going to be  
8 put in an envelope and sealed up and you're going to  
9 come to me and say can we have them reviewed for  
10 national security purposes, and we're going to find  
11 out what the details are on that, and then say yeah  
12 or nay or change it or whatever.

13 MR. SHEALY: Your Honor.

14 THE COURT: Yes, sir.

15 MR. SHEALY: May I -- I think I can speak for  
16 the Government -- and I'll let Mr. Patel address  
17 this; I don't think he disagrees -- candidly, we've  
18 been thrown a bit of a loop here this morning. We  
19 did not know we were going to get into all these  
20 issues. We thought we had a schedule worked out, we  
21 may be wrong, we'll admit that, the Court may not  
22 like that. We thought we had something worked out  
23 and we all agreed we could work with. And we all  
24 understood, while we were working through this  
25 schedule we proposed, Mr. Patel understood how he

1 was dealing with his client. He's indicating yes, I  
2 think. He understood how he was to deal with his  
3 client. We understood that. We understood the  
4 nature of the relationship, however you want to  
5 characterize it, between Mr. Patel and his client.

6 THE COURT: Not --

7 MR. SHEALY: And we respect --

8 THE COURT: He's the one that had the question,  
9 and the Government's the one that said that it  
10 didn't acknowledge it.

11 MR. SHEALY: A lot of things have been raised --

12 THE COURT: Right.

13 MR. SHEALY: -- in the petitions and the  
14 filings. The reason we came here today was to  
15 narrow that --

16 THE COURT: Right.

17 MR. SHEALY: -- to try to tell the Court --

18 THE COURT: That's what I'm trying to do.

19 MR. SHEALY: -- how we'd like to proceed. We  
20 had, at least between us, I think we knew how these  
21 were going to work --

22 THE COURT: Well, you know --

23 MR. SHEALY: -- in this time period.

24 THE COURT: You know, Mr. Shealy, I asked y'all  
25 back when the petition was first filed, to get with

1 Mr. Patel and his associates to work out something  
2 and submit it to me. Nothing was forthcoming.  
3 That's why I scheduled this hearing.

4 Now then, every time I make a suggestion I'm  
5 told something like the Government does not  
6 recognize us as attorney-clients; or, we don't have  
7 attorney-client privilege; or, we can't talk to our  
8 client. And I'm just trying to flesh out these  
9 issues and see if they are real issues that are  
10 impediments to going forward with this case in  
11 whatever way the Court wants to proceed with the  
12 case. And --

13 MR. SHEALY: If the Court wants to proceed  
14 differently, I understand. And I guess --

15 THE COURT: That's all I'm trying to do.

16 MR. SHEALY: I guess we did not -- I think Mr.  
17 Patel will agree -- we didn't think we were going to  
18 get into all this today. We thought the Court was  
19 going to accept our proposal.

20 THE COURT: Well, you should have submitted the  
21 proposal before we scheduled the hearing, Mr.  
22 Shealy, and then I could have -- because I've been  
23 thrown a loop too, you know, I came here thinking  
24 that there was no proposal.

25 MR. SHEALY: Yes, sir.

1 THE COURT: And thinking that we were going to  
2 decide how we were going to proceed with this case,  
3 not knowing whether he wanted to go forward with an  
4 evidentiary hearing and have discovery, not knowing  
5 whether he wanted to go forward with legal issues,  
6 or what you wanted. So y'all are not the only one  
7 that was thrown a loop.

8 And also, I've been thrown a loop because I'm  
9 being told that the Government does not, at least  
10 that Mr. Patel thinks the Government did not  
11 recognize him as attorney for Mr. Padilla, which is  
12 not what the Court understood. The Court has him as  
13 attorney of record.

14 MR. SHEALY: I think that's a misunderstanding  
15 in the Court.

16 THE COURT: Then we cleared it up, and that's  
17 all I'm trying to do is clear up these  
18 misunderstandings.

19 MR. SHEALY: And I didn't realize the Court  
20 didn't have the filing under seal. I thought you  
21 had that before you.

22 THE COURT: It was brought up to me yesterday,  
23 and it was not filed in accordance the local rules.

24 MR. SHEALY: I understand.

25 THE COURT: And I'm not going to go unsealing



1 documents and looking at things that -- particularly  
2 in this case --

3 MR. SHEALY: I understand that.

4 THE COURT: -- that I don't know what's inside,  
5 or have a representation of it. Or --

6 MR. SHEALY: The proposal that we can agree to,  
7 and I think if the Court would -- when the Court is  
8 able to read the entire agreement, I think more  
9 things will be clear. But I don't think the  
10 Government, quite frankly, and the attorneys --  
11 well, whatever difficulty we had, I think we  
12 understood how we were working with respect to Mr.  
13 Padilla.

14 THE COURT: And with regard to legal issues.

15 MR. SHEALY: Yes, sir. And that the reason we  
16 proposed, and Mr. Patel proposed what we did today,  
17 was for him to make summary judgment on a very  
18 narrow legal issue which they'd like to make summary  
19 judgment on, and deal with that first. And then  
20 when the Court rules on that, then we have a number  
21 of options, including what we've already discussed,  
22 they may or may not take interlocutory appeal.  
23 That's between the Court and, quite frankly, Mr.  
24 Patel. We have no problem with that.

25 And then at that point we would then begin, or



1 maybe not begin, depending how the Court rules, with  
2 these issues we have, we talked about here today.  
3 And perhaps by that time we would have a great deal  
4 of this worked out.

5 But what I think Mr. Patel wanted to do, and the  
6 defense, what Mr. Padilla wanted to do and what we  
7 wanted to do is to allow him to pursue this narrow  
8 legal issue first, work its way through, let us  
9 focus on briefing that and get it done, and then  
10 focus on all this more complicated stuff.

11 THE COURT: I understand that.

12 MR. SHEALY: If the Court does not wish to do  
13 that, then we --

14 THE COURT: But all I -- I want to make sure  
15 that it's on the record that I've done what I can do  
16 to see that Mr. Padilla's due process rights are  
17 protected, that there aren't going to be any  
18 complaints at whatever level, that Mr. Patel, that  
19 his clients were not able to talk to his client -- I  
20 mean his lawyer was not able to talk to his client.

21 MR. SHEALY: Yes, sir.

22 THE COURT: That there aren't any complaints at  
23 whatever level that the Government does not -- that  
24 Mr. Patel is not the attorney, or didn't get the  
25 respect that he was entitled to as his attorney,

1 that there is -- it's clear on the record that if we  
2 pursue this avenue that there's not going to be  
3 whining that poor Mr. Padilla has been languishing  
4 in jail for all this period of time because there's  
5 been a strategic decision to let him sit there while  
6 we piecemeal this case. I want all of that clear.

7 MR. SHEALY: I think they have agreed to this  
8 interim period, to that. And I --

9 THE COURT: I understand, but you interrupted  
10 when we were talking about the attorney-client  
11 issue, and I was asking if there was anything else,  
12 and he was saying well, now there's the national  
13 security issue. And even on -- I mean, when you sit  
14 down and talk to a client, you make notes, Mr.  
15 Shealy. I think that's a tremendous handicap for an  
16 attorney not to be able to make notes when he's  
17 talking to his client.

18 MR. SHEALY: I just think that what -- and I'll  
19 end by I think the way we came in here this morning,  
20 with all due respect to the Court, Mr. Patel agreed  
21 to this proposal. And what -- I think what the  
22 defendant wishes to do and what we agree with, he  
23 thinks he has sufficient information do that, the  
24 way things are operating now. And I'll let  
25 him address that. That's what I understood.

1 MR. PATEL: Your Honor, I think it is in my  
2 client's best interests to expeditiously, and the  
3 schedule we've set does review this critical issue,  
4 legal issue, expeditiously. And I think it is to my  
5 client's advantage for us, and when I say us, I mean  
6 the petitioner, the Government and the Court, to  
7 deal with that issue thoroughly. And at that point,  
8 Your Honor, when Your Honor's rendered a decision  
9 of -- then we can -- and that decision will -- is in  
10 the very near foreseeable future, then we can  
11 address dealing with some of these other very  
12 complex issues, which it is our hope that we will  
13 never have to ask Your Honor to resolve.

14 THE COURT: Well --

15 MR. PATEL: And we think that's the most  
16 efficient use of everybody's energies as we stand  
17 here today and as we --

18 THE COURT: So these issues that you're raising  
19 now are not going to come into play in your  
20 litigation of this other issue, the legal issue.

21 MR. PATEL: The issues that we talked about  
22 to -- the issues of --

23 THE COURT: Attorney-client privilege, determine  
24 all those sorts of things, your access to your  
25 client --

1 MR. PATEL: Discovery.

2 THE COURT: -- interrogation of your client, all  
3 of that -- that's all of that. So that the only  
4 thing that is in issue now and the only thing that  
5 will be going up will be the first issue in your  
6 petition.

7 MR. PATEL: We are not waiving the other things,  
8 Your Honor, but we are agreeing to table them so  
9 that we can expeditiously resolve that legal issue.

10 THE COURT: I understand that. And all I'm  
11 saying is that by tabling them, you accept all of  
12 the detriment that comes with tabling them, and the  
13 detriment that comes with tabling them will not be  
14 an issue henceforth.

15 MR. PATEL: Your Honor, we are not going to  
16 complain that somebody gave us something that we  
17 asked for. We are adults and we understand --

18 THE COURT: No, I --

19 MR. PATEL: -- the consequences of our decision.

20 THE COURT: I don't know, there's been a lot of  
21 complaining so far about the way -- that he  
22 hasn't -- the second issue in your petition is he  
23 hasn't gotten his due process proceedings. And so  
24 you are complaining that you haven't gotten  
25 something, and now you're asking that it not be

1 given to you now and that we wait. And --

2 MR. PATEL: We are agreeing to table that.

3 THE COURT: And there is a detriment to tabling  
4 it; you understand that.

5 MR. PATEL: I do, Your Honor.

6 THE COURT: Okay. And that's not -- the  
7 detriment that flows from your tabling it, is not  
8 going to be an issue in the future.

9 MR. PATEL: As I understand it, Your Honor, the  
10 detriment is that we will not be able to say that  
11 from September 14th until whenever Your Honor makes  
12 that decision --

13 THE COURT: Or if you take it up to the Supreme  
14 Court and it comes back two years later. Because  
15 frankly, you have been given what you asked for in  
16 the past, and frankly, you have been complaining  
17 about the detriment that flowed from getting what  
18 you wanted.

19 MR. PATEL: Your Honor, we have -- I'm --  
20 actually, Your Honor, I'm not sure I understand --

21 THE COURT: Here, you asked to be able to  
22 litigate this case in New York, and you litigated it  
23 and you lost. And now the first thing you say in  
24 the petition down here is he's been languishing in  
25 custody for two years and you wanted me to expedite



1 hearings and you wanted me to have oral arguments  
2 within ten days of the date that you filed your  
3 reply. And I don't know why you did that, when  
4 that's really not realistic, except to emphasize the  
5 fact that there's been a detriment, that is, Mr.  
6 Padilla has been kept in custody for two years while  
7 you litigated the way you thought was best.

8 And I don't -- I don't fault you for litigating  
9 it the way you did, but all I'm saying is if you do  
10 it that way, don't come back in here, don't come  
11 back here two years from now saying we have to have  
12 an evidentiary hearing in an hurry, because now he's  
13 been in jail for four years. That's all I'm saying.

14 MR. PATEL: No, I understand that, and I'm -- I  
15 appreciate Your Honor phrasing it that way, because  
16 my -- my expectation, and again, I haven't had an  
17 opportunity to discuss this with the Government or  
18 even with my co-counsel. But if Your Honor was to  
19 rule against us, and say that the President does  
20 have the authority, which -- a decision which I  
21 would expect that Your Honor would render in the not  
22 terribly distant future, and certainly in the scheme  
23 and the scale of this case, rather soon.

24 At that point, Your Honor, I would think that we  
25 would begin essentially two tracks, those -- there

1 would be the discussion of the interlocutory appeal.

2 THE COURT: See, that's my question. If you're  
3 just waiting on my decision to start a dual track, I  
4 question the -- I question that decision. Because  
5 we can start a dual track now, and that's what I'm  
6 offering you.

7 MR. FREIMAN: Your Honor, as I mentioned before,  
8 in all candor, we fully expect to seek interlocutory  
9 review, should Your Honor rule against us on this  
10 threshold issue.

11 THE COURT: I know that. He just said though  
12 that after I ruled, that then he would consider a  
13 dual track.

14 MR. FREIMAN: Well, Your Honor --

15 THE COURT: Or did I hear you wrong, Mr. Patel?

16 MR. PATEL: Your Honor, maybe I spoke before I  
17 had a chance to consult both with my co-counsel and  
18 with the Government. That's a possibility, but I'm  
19 not certain that that would be the appropriate thing  
20 for us to do.

21 THE COURT: Well, I think that's a possibility  
22 we need to cross right now. Because if you're  
23 waiting on my decision to decide whether to do a  
24 dual track, I'm not going to do it twice, if that's  
25 the way you want to argue it. Let's either start on



1 a dual track or let's not start on a dual track, but  
2 don't have me go through one exercise and then come  
3 back and say, well, now let's do what you wanted to  
4 do back in September.

5 MR. FREIMAN: Your Honor, absent some sort of  
6 extreme intervening event, some kind of enormous  
7 factual revelation that none of us sitting here or  
8 on the telephone know about right now, or a decision  
9 by the Government, for instance, to indict Mr.  
10 Padilla somewhere, absent an event like that, I  
11 think our preference would strongly be to seek  
12 interlocutory review of an adverse order on the  
13 threshold issue. Of course we would first, as we  
14 would need to, object to the report and  
15 recommendation before Judge Floyd, and --

16 THE COURT: No, no, no, you have all that -- you  
17 have all those rights, I'm not saying that you would  
18 accept my -- and of course Judge Floyd will have a  
19 chance to look at it and so forth. But I just  
20 wanted to make it clear that once we start down one  
21 track, that's where we're going, we're not going  
22 back.

23 MR. FREIMAN: Yes, Your Honor, and I think --

24 THE COURT: Right now is the juncture.

25 MR. FREIMAN: You correctly read our strong

1 preference for moving along the single track until  
2 that track is resolved, at whatever level is the  
3 final resolution, in accordance with the wishes of  
4 this Court, Judge Floyd, et cetera.

5 THE COURT: What's the Government feel about  
6 that?

7 MR. SALMONS: Your Honor, we have no objection  
8 to proceeding in that way. We -- we're fine with  
9 that approach, if that's petitioner's choice.

10 THE COURT: I'm sorry, what was that last  
11 statement?

12 MR. SALMONS: We are fine with that approach, if  
13 that's the way petitioners would like to proceed.

14 THE COURT: Okay. Yes, sir. Who is that, Mr.  
15 O'Connell?

16 MR. O'CONNELL: Michael O'Connell, Your Honor.  
17 I better not say anything until I talk to my  
18 co-counsel. I just have an idea, but I think I  
19 better wait and talk with them, because I don't know  
20 how I can do that right now without -- I guess I  
21 can't do it right now.

22 THE COURT: Okay. All right.

23 MR. O'CONNELL: Judge, let me suggest this. If  
24 we could agree that we're going to go with the  
25 schedule we have given you as far as the briefing's

1 concerned, and the other issues that you have  
2 raised, which I think are valid, if we could have  
3 some time to speak with one of them and the  
4 Government and to see whether we can resolve them,  
5 whether we want to resolve them now or not, and then  
6 come back to you and tell you we are not going to  
7 resolve them and we don't want you to resolve them  
8 now, or we do want you to resolve them now.

9 I'm not talking about a lengthy period of time,  
10 I'm talking about a couple of weeks.

11 THE COURT: Let me say this. I'm not going to  
12 issue a scheduling order from the bench, I'm not  
13 going to do it this afternoon. I'm going to think  
14 about what we've said here today. And frankly, make  
15 sure that Judge Floyd is comfortable with my  
16 recommendation or my decision on the scheduling.

17 And so if you want to consult with your  
18 co-counsel and advise the Government and me of some  
19 other approach that you think is prudent, then I'll  
20 be glad to hear it. But it will be sometime next  
21 week before any scheduling order is issued.

22 MR. O'CONNELL: I just think it would be a good  
23 idea if we had an opportunity to speak with the  
24 Government outside, off the record, and we could  
25 resolve some of these issues.

1 MR. FREIMAN: Your Honor, would it be of any  
2 value to you, were the parties to submit a joint  
3 suggested scheduling order on paper?

4 THE COURT: I think you've outlined it here, and  
5 I have what you told me, which was October 18th,  
6 November 22nd, December 13th, and then at that time  
7 decide whether there's oral argument or another  
8 status conference, is what I understand. Do you  
9 propose anything different from that?

10 MR. FREIMAN: No, Your Honor.

11 THE COURT: Okay. Well, let me just -- I think  
12 I know where y'all are coming from, and I want to  
13 make sure that everybody understands that this Court  
14 is ready, willing and able to give Mr. Padilla his  
15 due process hearing and notice and everything that  
16 he's entitled to. And that if there's an election  
17 not to do that, or that that's the election, not to  
18 -- to have that at this time is one that rests at  
19 the feet of his counsel. And then we'll see where  
20 we go from here. Okay?

21 Anything else from the Government, Mr. Salmons,  
22 or Mr. --

23 MR. SRINIVASAN: Srinivasan.

24 THE COURT: Yes, sir.

25 MR. SALMONS: Nothing here, Your Honor.

1 MR. SRINIVASAN: No, Your Honor, thank you for  
2 your time.

3 THE COURT: Thank you. Mr. Shealy?

4 MR. SHEALY: No, sir.

5 THE COURT: Mr. Patel, anything else?

6 MR. PATEL: Not at this time, Your Honor, thank  
7 you.

8 THE COURT: Mr. Freiman, anything else?

9 MR. FREIMAN: No, sir, thank you.

10 THE COURT: Okay. Thank you very much. I  
11 appreciate it.

12

13 (Court adjourned.)

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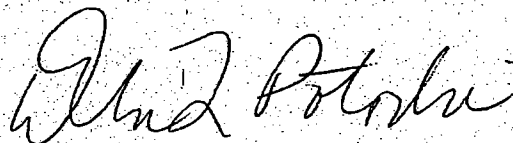
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REPORTER'S CERTIFICATION

I, Debra L. Potocki, RDR, CRR, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, to the best of my ability.



Debra L. Potocki, CRR

Dated: September 15, 2004